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SENATE

REPORT
99-393

ORIGINAL

PAULETTE MENDES-SILVA

AUGUST 12 (legislative day, AUGUST 11), 1986.—Ordered to be printed

Mr. THURMOND, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 2316]

The Committee on the Judiciary, to which was referred the bill (H.R. 2316) for the relief of Paulette Mendes-Silva, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of the bill is to waive section 2675 and the limitation provisions of section 2401(b) of title 28, United States Code, and confer jurisdiction on the U.S. District Court for the District of Columbia to hear, determine and render judgment on the claims of Paulette Mendes-Silva for personal injuries allegedly incurred from an inoculation administered by an employee of the Public Health Service of the United States Department of Health, Education and Welfare.

STATEMENT OF FACTS

In 1963, Paulette Mendes-Silva accepted a position to serve as an interpreter at the International Cotton Conference in Bangalore, India. On March 12, 1963, in preparation for this conference and in compliance with the current health regulations, Ms. Mendes-Silva received an inoculation against small pox at the Arlington Health Center in Arlington, Virginia. Later that same day, Ms. Mendes-Silva was inoculated against yellow fever at the Out-Patient Clinic of the U.S. Public Health Service. At that time, it was generally recommended that two live virus vaccines be administered at least 4 days apart. It appears that neither administering staff ascer-

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tained whether or not other vaccines had been, or were going to be, administered that day.

On March 19, 1963, Ms. Mendes-Silva was admitted to Georgetown University hospital and was diagnosed as having post-vaccinal encephalitis, a rare disabling disease associated with live virus inoculations. Ms. Mendes-Silva's physical condition deteriorated rapidly, leaving her in need of constant medical supervision.

The Departments of Justice and Health and Human Services oppose this legislation since Congress provides for such claims in the waiver of the Government's sovereign immunity under the Federal Tort Claims Act. To grant an exception would set a precedent for the introduction of similar legislation.

After careful examination of the unique circumstances surrounding this claim, the Committee on the Judiciary favorably reports this legislation. The Committee determines that the grievous circumstances following the vaccinations prevented Ms. Mendes-Silva from pursuing her claim in a timely manner. The burden of proof rests upon the claimant to show that the government employee was negligent in administering the vaccine.

The following documents were submitted to the Senate with regard to Ms. Mendes-Silva's claim:

THE SECRETARY OF STATE,
Washington, May 31, 1963.

JOHN F. PRESTON, Jr., M.D.,
Lockheed Missiles and Space Co., Sunnyvale, CA.

DEAR JOHN: Thank you for your letter concerning Mrs. Paulette Mendes-Silva. It was very kind of you to take an interest in this case.

Our Medical Division made extensive checks throughout Washington, both in government and private circles, to determine whether assistance could be provided to Mrs. Mendes-Silva, Mrs. Mendes-Silva had not been under contract to the Department of State for approximately two years nor had she been under contract with any or other related agencies—such as AID—during the past year. Since the immunizations were not given in connection with official U.S. Government employment, the U.S. Government could not be responsible for meeting expenses incurred by her illness.

The International Cotton Board, the organization for which Mrs. Mendes-Silva was scheduled to go to Bangalore, is a private organization. We have asked Mr. Mendes-Silva to check with this group to learn whether it has any responsibilities for her care.

As you know, Dr. Bulle made a formal request to the Institute of Neurological Diseases and Blindness of the National Institute of Health requesting that it admit her for study and treatment. Unfortunately, its clinical center only admits patients whose conditions are of interest from a research point of view or for which a study group is in progress. At the present moment, there is no program on post vaccinal encephalitis.

I am pleased to report that Mrs. Mendes-Silva has shown some signs of returning functions. Specifically, there has been some slight return of motion in the fingers of her right hand and she is now able to swallow. As a result of this, the doctors at Georgetown have begun to reduce the amount of private nursing care which

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she formerly required. This will, I hope, ease the family's financial burden somewhat.

I again want to thank you for your interest in this case and for your kind words.

With warm regards,

Sincerely,

DEAN RUSK.

[The adverse reports from the Departments of Justice and Health and Human Services are as follows:]

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS,
Washington, DC, May 16, 1984.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: This letter responds to your requests for the views of the Department of Justice on H.R. 4334, a bill for the relief of Paulette Mendes-Silva. For the reasons contained herein, the Department of Justice recommends against enactment of this legislation. If enacted, this bill would waive any defense available to the government on the issue of the United States' liability and the legal cause of the injuries that are the subject of this bill. Furthermore, this bill would waive several of the jurisdictional prerequisites to maintaining a personal injury action against the government under the Federal Tort Claims Act. In particular, the bill would suspend the requirement that an action be commenced within the acceptable statute of limitations, or be forever barred. 28 U.S. 2401(b). Furthermore, the bill would suspend the requirement that a claim first be presented to the appropriate federal agency for investigation and administrative adjudication. 28 U.S. 2675.

While we have presented our views on the legal merits of the case, the Department of Health and Human Services, in their report to your committee, has detailed the programmatic circumstances for opposing the enactment of H.R. 4334.

As you are aware, the Federal Tort Claims Act is a limited waiver of the sovereign's immunity from suit. In granting this limited waiver the Congress provided various specific terms and conditions applicable to the government's narrow consent to suit and the courts have uniformaly held that the Federal Tort Claims Act's limited waiver of sovereign immunity should be strictly construed. Accordingly, while we are sympathetic to Ms. Mendes-Silva's condition, the granting of the relief requested in this case would establish an undesirable and unwarranted precedent for preferential treatment. Singling Paulette Mendes-Silva out for special treatment not accorded other individuals under similar circumstances would subvert the well-established principle of American jurisprudence that requires the uniform application of the law to all persons. Enactment of this bill would also be in contravention of one of the major reasons for the enactment of the Federal Tort Claims Act in the first place, i.e., the increasing volume of private relief bills, which burdened Congress. Furthermore, if favorably consid-

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ered, this legislation would hamper the government's ability to investigate and adjudicate personal injury and wrongful death claims inasmuch as it would remove any incentive for filing a timely claim and would further prejudice the government's ability to defend itself due to the problems inherent with the passage of time. Such a course of action must not be condoned. For the foregoing reasons, the Department of Justice recommends against enactment of this legislation.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

ROBERT A. MCCONNELL,
Assistant Attorney General,
Office of Legislative and Intergovernmental Affairs.

THE SECRETARY OF HEALTH AND HUMAN SERVICES,
Washington, DC, May 24, 1984.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: This is in response to your request for a report on H.R. 4334, a bill "For the relief of Paulette Mendes-Silva".

The bill would provide that Congress find and declare the Public Health Service negligent in administering an inoculation against yellow fever to the named beneficiary on March 12, 1963, proximately causing her injury. The bill would further direct that certain statutory prerequisites and limitations be waived to allow a United States district court to have jurisdiction to hear, determine, and render judgment on the amount of damages payable for her injuries.

While we are sympathetic to Ms. Mendes-Silva's condition, we oppose the bill because there is no equitable basis for relief. The encephalitis and other alleged damages suffered by Ms. Mendes-Silva were almost certainly caused by a reaction to smallpox vaccine or to infection by another virus, such as herpes simplex, rather than by the yellow fever inoculation. Yellow fever vaccine does not increase the risk associated with smallpox vaccine when the two are taken together. Furthermore, the bill's beneficiary failed to pursue a timely remedy under the Federal Tort Claims Act, although she was on notice of possible Government liability.

Ms. Mendes-Silva's situation is discussed in detail in the attached staff memorandum.

We therefore recommend that the bill not be favorably considered.

We are advised by the Office of Management and Budget that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

MARGARET M. HECKLER,
Secretary.

Attachment.

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STAFF MEMORANDUM—H.R. 4334

H.R. 4334 would declare the United States liable for personal injury damages allegedly caused by employees of the Public Health Service (PHS) when they administered a yellow fever inoculation to Paulette Mendes-Silva 21 years ago, on March 12, 1963. The bill would grant jurisdiction to the United States District Court for the District of Columbia to determine her damages.

Ms. Mendes-Silva received the inoculation at the PHS Clinic in Washington, D.C., in compliance with health regulations, prior to foreign travel. She had a contract with the State Department to act as an interpreter at an international conference in India. Earlier the same day, she was inoculated against smallpox at a clinic in Arlington, VA.

By March 15, 1963, she states that she began having severe headaches and body stiffness. On March 19, 1963 she was admitted to Georgetown University Hospital in a "stuporous state". The diagnosis was post-vaccinal encephalitis.

Ms. Mendes-Silva reports that she suffered disabling muscle damage as a result of her illness. Despite extensive rehabilitation, beginning April 1, 1963 in the United States and continuing in London, England from January 1964 to present, she claims she cannot walk without assistance and cannot swallow or cough properly due to paralysis in her throat. She also experiences pain and stiffness daily and frequently suffers from infection. Her health insurance does not cover nursing and physiotherapy treatments costing $66.00 daily.

Ms. Mendes-Silva states that she attempted to assert a tort claim against the United States repeatedly from 1963 to 1968. She says Government officials "discouraged" her from taking legal action. Furthermore, she states that several attorneys she consulted advised her that suit against the United States would be unsuccessful. Eventually her claim against the Government under the Federal Tort Claims Act was barred by the two year statute of limitations at 28 U.S.C. 2401(b).

It is highly unlikely that Ms. Mendes-Silva's injury was the result of the yellow fever inoculation. Although there have been 16 cases of encephalitis reported in infants seven months old or younger who have received yellow fever vaccine, no such adult case of encephalitis has been recorded.

On the other hand, encephalitis or other adverse reactions result as frequently as once in 63 inoculations in some populations from smallpox vaccine. This was a factor in discontinuing routine inoculation in the United States after smallpox came under general worldwide control. Furthermore, yellow fever vaccine does not increase the risk associated with smallpox vaccine when the two are taken together. Other viruses, such as herpes simplex, are more likely causes of encephalitis than reaction to yellow fever vaccine.

In general, the Department opposes private bills for relief from damages for personal injury or death. Under the Federal Tort Claims Act, Congress provided a limited waiver of the Government's soveriegn immunity to compensate for the negligence of Federal employees. Standards were prescribed for proving claims

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within a statutory time limit to discourage claimants from filing stale claims.

Ms. Mendes-Silva was aware that she suffered a severe illness with disability only days following inoculation with yellow fever vaccine. Despite her awareness, Ms. Mendes-Silva did not file a claim against the Government before the statute of limitations expired and thus avail herself of the opportunity to prove her case in a timely manner.

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